

CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL  
N° : 500-06-000777-157

SUPERIOR COURT  
(Class Actions Division)

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*"Toutes les personnes physiques ayant acquis au Québec d'Intrawest ULC, ou l'une de ses filiales ou sociétés liées, des points du Club Intrawest, à l'exception de celles qui s'en sont départis avant l'introduction, en 2007, d'un prix plancher de revente de ces points devant être respecté pour transférer les pleins avantages liés à ces points et à la participation au Club Intrawest."*

the Group

-and-

MARTIN ROBICHAUD

Plaintiff

v.

INTRAWEST ULC

-and-

DIAMOND RESORTS CORPORATION

-and-

DIAMOND RESORTS INTERNATIONAL  
INC.

-and-

DIAMOND RESORTS IW HOLDING  
COMPANY

-and-

DIAMOND RESORTS CANADA, LTD.

Defendants

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APPLICATION FOR LEAVE TO ADDUCE RELEVANT EVIDENCE

(Art. 574 C.p.c.)

TO THE HONOURABLE JUSTICE DONALD BISSON, S.C.J., THE DEFENDANTS DIAMOND RESORTS CORPORATION, DIAMOND RESORTS IW HOLDING COMPANY AND DIAMOND RESORTS CANADA, LTD., RESPECTFULLY SUBMIT THE FOLLOWING:

## **I. INTRODUCTION**

1. On January 12, 2023, Martin Robichaud ("**Plaintiff**") filed an *Application for Authorization to Carry out a Class Action and for the Grant of Representative Status, as well as for the Amendment of the Application initiating the Proceedings* seeking to add four (4) additional defendants to the present class action, namely:
  - a) Diamond Resorts Corporation ("**Diamond Corporation**");
  - b) Diamond Resorts International Inc. ("**Diamond International**");
  - c) Diamond Resorts IW Holding Company ("**Diamond Holding**"); and
  - d) Diamond Resorts Canada, LTD ("**Diamond Canada**")
 (collectively the "**Diamond Entities**")
2. On November 3, 2023, at the request of this Court, Plaintiff amended its proceedings and filed a *Modified Application for Leave to Amend the Application Initiating the Proceedings* (the "**Application to Amend**").
3. As further discussed below, the Diamond Entities' involvement in this class action is predicated on Plaintiff's allegation that the assets of Intrawest ULC, which has been the sole Defendant in this class action since December 30, 2015, were acquired and/or assigned to the Diamond Entities in November 2015.
4. In support of this allegation, Plaintiff relies on a redacted copy of the Purchase Agreement, Exhibit R-10, entered into by Intrawest ULC and Intrawest U.S. Holdings Inc. ("**Intrawest Holdings**", and collectively with Intrawest ULC, the "**Intrawest Sellers**"), and Diamond International and Diamond Corporation (collectively the "**Diamond Purchasers**") on November 24, 2015.
5. As appears from the Court's record, Plaintiff obtained access to this redacted Purchase Agreement back when the Diamond Entities were not parties to this class action.
6. Now that the Diamond Entities have formally been assigned as proposed defendants, they will seek to defend against the Application to Amend and the authorization of the class action towards them.
7. In this context, the Diamond Entities hereby request leave to adduce relevant evidence into the Court's record for the upcoming hearing of Plaintiff's Application to Amend and class action authorization, namely the following documents:
  - The sworn declaration of M. Peter Mitchell, to which is appended the following documents:

- a) a copy of the certificate of merger between Diamond International and Dakota Holdings inc.;
- b) a copy of the certificate of merger between Dakota Holding inc. and Hilton Grand Vacations Borrower LLC;
- c) a copy of the purchase agreement entered into by the Intrawest Sellers and the Diamond Purchasers on November 24, 2015, where relevant sections have been unredacted;
- d) a copy of the January 28, 2016 amendment of the purchase agreement; and
- e) a copy of the assignment agreement entered into by Intrawest ULC and Diamond Holdings on January 29, 2016, where relevant sections have been redacted;

(the “**Proposed Relevant Evidence**”)

- 8. This Proposed Relevant Evidence will provide this Court with an opportunity to assess whether the criteria provided at article 575 of the *Code of Civil Procedure* (the “**CCP**”) are met and more specifically whether the facts alleged in Plaintiff’s Application to Amend justify the conclusions sought (as required under article 575(2) CCP).
- 9. This purely legal determination will depend on the analysis of the rights and obligations acquired and assumed by the Diamond Entities through the Proposed Relevant Evidence.

## **II. THE HISTORY OF THE PROCEEDINGS BEFORE THE APPLICATION TO AMEND**

- 10. An overview of the history of the proceedings is relevant to situate when the Diamond Entities became involved – first as a non-party and then as proposed additional defendants – in the present proceedings.
- 11. On December 30, 2015, Plaintiff filed a *Motion for Authorization to Institute a Class Action and for Grant of Representative Status* against Intrawest ULC only.
- 12. On March 20, 2018, Justice Anne Jacob authorized the institution of a class action against Intrawest ULC. Justice Jacob further granted Plaintiff representative status for the following group:

*"Toutes les personnes physiques ayant acquis au Québec d'Intrawest ULC, ou l'une de ses filiales ou sociétés liées, des points du Club Intrawest, à l'exception de celles qui s'en sont départis avant l'introduction, en 2007, d'un prix plancher de revente de ces points devant être respecté pour transférer les pleins avantages liés à ces points et à la participation au Club Intrawest."*

- 13. On June 18, 2018, Plaintiff filed a *Demande introductive d'instance* in accordance with the authorization judgment.

14. The class action is predicated on three main allegations, which in great part relate to Plaintiff's adhesion to Club Intrawest by entering into the *Entente d'achat et d'adhésion* dated May 9, 2009 (Exhibit R-2) (the "**Membership Agreement**"):
  - a) At the time of Plaintiff's adhesion to Club Intrawest, Intrawest ULC would have made false representations and omitted to divulge important facts and external contractual documents to Plaintiff;
  - b) At the time of Plaintiff's adhesion to Club Intrawest, Intrawest ULC would have failed to divulge that the annual fees for Club Intrawest's membership (the "**Annual Fees**") would vary every year; and
  - c) At the time of Plaintiff's adhesion to Club Intrawest and through the implementation of the Membership Agreement, Intrawest ULC would have failed to divulge the application of certain of the Membership Agreement's terms (including the terms concerning Intrawest ULC's right of first refusal, the minimum resale price of the points acquired by Plaintiff to book vacation time (the "**Points**") and the Points' redemption) and would have rendered the Points unsellable or sellable at disadvantageous conditions.
  
15. The common issues identified are as follows:
  - a) *Intrawest a-t-elle usé de pratiques interdites de commerce à l'endroit des membres ?*
  - b) *Les frais réclamés aux membres étaient-ils valides en regard de la LPC ?*
  - c) *Le cas échéant, Intrawest doit-elle rembourser les frais aux membres ?*
  - d) *Considérant les infractions d'Intrawest à la LPC, le cas échéant, les membres ont-ils droit à la réduction de leurs obligations quant à l'acquisition des points ?*
  - e) *Le cas échéant, à quelle hauteur s'évalue cette réduction ?*
  - f) *Les membres ont-ils droit à l'octroi de dommages-intérêts punitifs en raison des infractions à la LPC commises par Intrawest ?*
  - g) *Subsidiairement, les clauses qui gouvernent la possibilité pour un membre de mettre fin à sa relation contractuelle avec Intrawest et le comportement de cette dernière dans leur mise en œuvre ont-elles un caractère et des effets abusifs ?*
  
16. Plaintiff seeks the condemnation of Intrawest ULC for:
  - a) The reimbursement of the Annual Fees;
  - b) The payment of an amount (to be perfected) corresponding to at least 75% of the amount paid to become a member of Club Intrawest and acquire the Points (*in lieu* of a purchase price reduction); and
  - c) Punitive damages for the alleged contraventions of the *Consumer Protection Act*, the *Regulation respecting the application of the Consumer Protection Act* and the *Civil Code of Quebec*.
  
17. As appears from the Court's record, in early 2019, the Court authorized Plaintiff to examine out-of-court representatives of Intrawest ULC, namely: Gérald Bélanger,

Nick Galbraith, Robert Reyes, Eric Matsukawa, Mark Malone, Trevor Bruno and Jane Sigmond.

18. From June 2019 to August 2019, Plaintiff examined these representatives, and many undertakings were subscribed, certain of which were objected to.
19. On November 2, 2020, Intrawest ULC provided Plaintiff with the answers to the undertakings subscribed during these pre-trial examinations, which comprised an affidavit signed by Jane Sigmond, to which was appended a redacted copy of the Purchase Agreement (Exhibit R-10) (as further discussed below in Section III.B.).
20. Plaintiff then took the position that these answers, as well as the redacted copy of the Purchase Agreement, allowed him to confirm that certain or all of the Diamond Entities were in possession of the documentation deemed relevant to the pursuit of the class action.
21. On March 1, 2021, Plaintiff therefore filed a *Demande d'ordonnance de communication de documents en possession de tiers* against the Diamond Entities pursuant to article 169 and 251 al. 2 CCP (Exhibit R-23).
22. On May 9, 2021, the Court authorized Plaintiff's documents request, as appears from the Court's record.
23. Between June 6 and 22, 2021, through the undersigned counsel, the Diamond Entities responded to the documents request.

### **III. THE ADDITIONAL EVIDENCE TO BE ADDUCED UNDER ARTICLE 574 CCP**

24. Additional evidence is required under article 574 CCP for the Court to fully comprehend the rights and obligations that the Diamond Entities acquired and/or assumed through the purchase of Intrawest ULC's assets, and to rule on the Application to Amend.
25. The following sub-sections offer a brief and targeted overview of the relevance and usefulness of the Proposed Additional Evidence to help this Court rule on the present application.
26. More specifically, the following sub-sections correspond to the topics addressed in the Proposed Additional Evidence, namely the sworn declaration of M. Peter Mitchell.

#### **A. THE DISSOLUTION OF DIAMOND INTERNATIONAL**

27. Diamond International was merged with and into a company called Dakota Holdings Inc. July 13th 2021, which was in turn merged with and into a company called Grand Hilton Vacations Borrower LLC.
28. Diamond International therefore does not exist anymore and its implication in these proceedings is consequently moot.
29. **Exhibit PM-4** and **Exhibit PM-5** of M. Peter Mitchell's sworn declaration confirm this.

## B. THE PURCHASE AGREEMENT

30. As mentioned, on November 24, 2015, the Intrawest Sellers sold certain assets to the Diamond Purchasers.
31. Under sections 2.01, 2.02 and 3.17 of the Purchase Agreement, the Diamond Purchasers acquired, among others, the Restated Management Agreement dated March 26, 2009, between Club Intrawest and Intrawest ULC (the “**Management Agreement**”).
32. However, under sections 2.02(a) and 2.02(b) of the Purchase Agreement, the Diamond Purchasers did not acquire liabilities and losses stemming from excluded assets.
33. Furthermore, under section 9.02 the Purchase Agreement, the Intrawest Sellers undertook to indemnify the Diamond Purchasers for losses or claims stemming from excluded assets and excluded liabilities.
34. The Purchase Agreement is thus at the cornerstone of the determination of whether the Diamond Entities - and actually which Diamond Entities - assumed or not liabilities for Intrawest ULC’s actions and assets dated prior to November 24, 2015.
35. Moreover, on January 28, 2016, the Restated Management Agreement was assigned to Diamond Holding. This Restated Management Agreement confirms which obligations Diamond Holding acquired as new manager of Club Intrawest (which became Club Embarc).
36. Without partially redacted copies of the Purchase Agreement and the Restated Management Agreement Assignment, which are appended to M. Peter Mitchell’s sworn declaration as **Exhibit PM-1** and **Exhibit PM-3**, this Court will not be in a position to come to this legal determination.

## C. THE AMENDMENT OF THE PURCHASE AGREEMENT

37. On January 28, 2016, the Intrawest Sellers and the Diamond Purchasers entered into an additional agreement, amending the Purchase Agreement (the “**Amendment Agreement**”).
38. Importantly, this Amendment Agreement provides that the losses that may arise from the present class action are excluded liabilities under the Purchase Agreement to the extent such losses arise from the conduct of the business by the Intrawest Sellers prior to the closing of the Purchase Agreement.
39. Without a copy of this Amendment Agreement, which is appended to M. Peter Mitchell’s sworn declaration as **Exhibit PM-2**, this Court will not be in a position to conclude on the legitimacy of the Diamond Entities’ presence as additional defendants in this class action.

#### **D. DIAMOND'S SALES AND RESALES PRACTICES**

40. The sales practices of Intrawest ULC, which are at the heart of this class action, and those of the Diamond Entities diverged considerably with respect to, *inter alia*, the disclosure of information at the pre-contractual and contractual stages and the resale or redemption of Points.
41. After the transaction of November 24, 2015, the Diamond Entities deployed their own sales practices.
42. According to these practices, the Diamond Entities did not, and still do not, impose a minimum resale price for Points, nor any redemption right. They also clearly disclosed, and still disclose, to all purchasers that annual fees will increase every year.
43. Without the sworn declaration of M. Peter Mitchell, this Court will not be in a position to be informed of the Diamond Entities' sales practices.
44. It is respectfully submitted that in light of that evidence, this Court should conclude to the clear non-liability of the Diamond Entities with respect to this class action because they never implemented the allegedly faulty sales practices at issue since the transaction of November 24, 2015.

#### **IV. CONCLUSION**

45. The Diamond Entities respectfully submit that the Proposed Evidence will assist the Court in ruling on the Application to Amend as per the criteria set forth in article 575 CCP.
46. Without the completion offered by the Proposed Additional Evidence, this Court will not fully comprehend which rights and obligations were acquired and assumed by the Diamond Entities on November 24, 2015 and afterwards, as well as the sales and resales practices implemented by them.
47. Given that Plaintiff's right of action arose prior to November 24, 2015, these questions are paramount to the pursuit of this class action.
48. The Diamond Entities submit that it is in the interest of justice to allow the present application. Indeed, the present application goes to whether the Diamond Entities should be added as additional defendants in this class action.

#### **FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** Defendants' Application for Leave to Adduce Relevant Evidence;

**GRANT** Defendants permission to produce into the Court's record, within thirty days of the judgment to be rendered, a sworn declaration substantially similar to the draft sworn declaration of M. Peter Mitchell, which is hereby communicated as **Exhibit D-1** and to which are appended **Exhibits PM-1, PM-2, PM-3, PM-4 and PM-5**.

**THE WHOLE** without costs, save in case of contestation.

**MONTREAL, November 24, 2023**

*Stikeman Elliott*

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